

\* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

November 28, 2007

DECISION AND ORDER  
OFFICE OF HEARINGS AND APPEALS

Hearing Officer Decision

Name of Case: Personnel Security Hearing

Date of Filing: August 29, 2007

Case Number: TSO-0538

This Decision concerns the eligibility of XXXXXXXXXXXX (hereinafter referred to as "the individual") to hold an access authorization under the Department of Energy's (DOE) regulations set forth at 10 C.F.R. Part 710, Subpart A, entitled, "General Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material."<sup>1</sup> In this Decision I will consider whether, on the basis of the testimony and other evidence in the record of this proceeding, the individual's access authorization should be restored. As discussed below, after carefully considering the record before me in light of the relevant regulations, I have determined that the individual's access authorization should not be restored.

**I. Background**

The individual has held a DOE security clearance for 24 years. Sometime in 2006, the individual assumed new job responsibilities that required his participation in the DOE's Human Reliability Program (HRP).<sup>2</sup> As part of the HRP application process, the individual completed and signed a Questionnaire for National Security Positions (QNSP) on November 14, 2006 (2006 QNSP). In that 2006 QNSP, the individual revealed for the first time that he had used marijuana in 1992. This admission of illegal drug use and the individual's failure to disclose this illegal drug use on security forms in 1997 and 2003, prompted the local DOE Security Office (LSO) to conduct two Personnel Security

---

<sup>1</sup> Access authorization is defined as "an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material." 10 C.F.R. § 710.5(a). Such authorization will be referred to variously in this Decision as access authorization or security clearance.

<sup>2</sup> The HRP is a security and safety reliability program designed to ensure that individuals who occupy positions affording access to certain materials, nuclear explosive devices, facilities, and programs meet the highest standards of reliability and physical and mental suitability. *See* 10 C.F.R. § 712.1. Among the numerous requirements for participation in the HRP are the following: a level "Q" DOE security clearance, a psychological evaluation, initial and random drug and alcohol tests and successful completion of a counterintelligence evaluation, including a counterintelligence-scope polygraph examination. *See* 10 C.F.R. § 712.11(1), (7), (8), (9) and (10).

Interviews (PSIs) with the individual, one on March 26, 2007, and the other on March 28, 2007.

On June 28, 2007, the LSO initiated formal administrative review proceedings under 10 C.F.R. Part 710 by issuing a Notification Letter to the individual advising that it possessed reliable information that created a substantial doubt regarding his continued eligibility to hold a security clearance. In an attachment to the Notification Letter, the DOE specifically enumerated the derogatory information at issue and stated that the information fell within the purview of three potentially disqualifying criteria set forth in the security regulations at 10 C.F.R. § 710.8, subsections (f), (k) and (l) (hereinafter referred to as Criteria F, K and L respectively).<sup>3</sup>

Upon his receipt of the Notification Letter the individual exercised his right under the Part 710 regulations by requesting an administrative review hearing. On August 29, 2007, the Acting Director of the Office of Hearings and Appeals (OHA) appointed me the Hearing Officer in this case. I subsequently convened a hearing within the time prescribed in the regulations. At the hearing, five witnesses testified. The LSO called one witness and the individual presented his own testimony and that of three other witnesses. In addition to the testimonial evidence, the LSO submitted 13 exhibits into the record; the individual tendered three exhibits. I closed the record in this case on November 5, 2007, when I received the hearing transcript (Tr.).

## **II. Regulatory Standard**

### **A. Individual's Burden**

A DOE administrative review proceeding under Part 710 is not a criminal matter, where the government has the burden of proving the defendant guilty beyond a reasonable doubt. Rather, the standard in this proceeding places the burden on the individual because it is designed to protect national security interests. This is not an easy burden for the individual to sustain. The regulatory standard implies that there is a presumption against granting or restoring a security clearance. *See Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) (“clearly consistent with the national interest” standard for granting security clearances indicates “that security determinations should err, if they must, on the side of denials”); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9<sup>th</sup> Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance).

---

<sup>3</sup> Criterion F relates, in relevant part, to information that a person “[d]eliberately misrepresented, falsified, or omitted significant information from a . . . a Questionnaire for Sensitive National Security Positions . . .” 10 C.F.R. § 710.8(f). Criterion K concerns information that a person has “[t]rafficked in, sold, transferred, possessed, used, or experimented with a drug or other substance listed in the Schedule of Controlled Substances established pursuant to section 202 of the Controlled Substances Act of 1970 (such as marijuana, cocaine, amphetamines, barbiturates, narcotics, etc.) except as prescribed or administered by a physician licensed to dispense drugs in the practice of medicine, or as otherwise authorized by Federal law.” 10 C.F.R. § 710.8 (k). Criterion L relates, in relevant part, to information that a person has “[e]ngaged in any unusual conduct or is subject to any circumstances which tend to show that the individual is not honest, reliable, or trustworthy; or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of the national security . . .” 10 C.F.R. § 710.8(l).

The individual must come forward at the hearing with evidence to convince the DOE that granting him an access authorization “will not endanger the common defense and security and will be clearly consistent with the national interest.” 10 C.F.R. § 710.27(d). The individual is afforded a full opportunity to present evidence supporting his eligibility for an access authorization. The Part 710 regulations are drafted so as to permit the introduction of a very broad range of evidence at personnel security hearings. Even appropriate hearsay evidence may be admitted. 10 C.F.R. § 710.26(h). Hence, an individual is afforded the utmost latitude in the presentation of evidence to mitigate the security concerns at issue.

## **B. Basis of the Hearing Officer’s Decision**

In personnel security cases arising under Part 710, it is my role as the Hearing Officer to issue a Decision that reflects my comprehensive, common-sense judgment, made after consideration of all the relevant evidence, favorable and unfavorable, as to whether the granting or continuation of a person’s access authorization will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.7(a). I am instructed by the regulations to resolve any doubt as to a person’s access authorization eligibility in favor of the national security. *Id.*

## **III. The Notification Letter and the Security Concern at Issue**

As previously noted, the LSO cites three potentially disqualifying criteria as the bases for suspending the individual’s security clearance, *i.e.* Criteria F, K, and L. To support its reliance on Criterion F, the LSO points to inconsistencies between the individual’s response to the illegal drug question on his 2006 QNSP and his response to that question on two other security forms. Specifically, on the QNSP executed by the individual on August 6, 1997 (1997 QNSP), he certified that (1) he had not used any illegal drugs within the last seven years, and (2) had never illegally used a controlled substance while possessing a security clearance. On the QNSP that he executed on September 17, 2003 (2003 QNSP), the individual certified that he had never illegally used a controlled substance while possessing a security clearance.<sup>4</sup> On his 2006 QNSP, however, the individual admitted that he had used marijuana in 1992 while holding a security clearance.

From a security standpoint, false statements made by an individual in the course of an official inquiry regarding a determination of eligibility for DOE access authorization raise serious issues of honesty, reliability, and trustworthiness. The DOE security program is based on trust, and when a security clearance holder breaches that trust, it is difficult to determine to what extent the individual can be trusted again in the future. *See e.g., Personnel Security Hearing* (Case No. VSO-0281), 27 DOE ¶ 82,821 at 85,915 (1999), *aff’d*, 27 DOE ¶ 83,030 (2000) (terminated by OSA, 2000); *Personnel Security Hearing* (Case No. TSO-0443), <http://oha.doe.gov/cases/security/tso0443.pdf>; *Personnel Security Hearing* (Case No. TSO-00415), <http://oha.doe.gov/cases/security/tso0415.pdf>.

---

<sup>4</sup> The individual responded negatively on his 2003 QNSP to the question asking whether he had used illegal substances within the last seven years. There is no issue about falsification regarding this response as the individual’s 1992 marijuana use occurred 11 years prior to 2003.

The LSO's Criterion K concerns are predicated on the individual's illegal drug use at various times between 1968 and 1992. In particular, the LSO cites as support for Criterion K the individual's alleged one-time use of marijuana in 1992, his use of marijuana four times a month from 1968 to 1972, his use of LSD 12 times from 1968 to 1969, and his illegal use of his wife's prescription diet pills sometime in the 1970s. In addition, the LSO alleges that the individual continues to associate with persons who use illegal drugs, *i.e.*, his son and his son's friends.

There are significant security concerns associated with past or current illegal drug usage. First, engaging in criminal conduct can raise questions about a person's ability or willingness to comply with laws, rules, and regulations. *See* Guideline H of the *Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* issued on December 29, 2005 by the Assistant to the President for National Security Affairs, The White House. Second, illegal drugs can impair a person's judgment which, in turn, can raise questions about the person's reliability and trustworthiness. *Id.* Moreover, from a common sense standpoint, a person's reliability and trustworthiness is questionable when he or she knowingly associates with persons who use illegal drugs.

As for Criterion L, the LSO alleges that the individual used marijuana while holding a DOE security clearance even though he knew that DOE prohibited this kind of conduct. The individual's use of illegal drugs in express contravention of DOE's policy against using illegal substances in all situations, especially while holding a security clearance, calls into question the individual's judgment, reliability, trustworthiness and his ability to protect classified information. *See id.*, Guideline E.

#### **IV. Findings of Fact**

The individual's use of illegal drugs dates back almost 40 years. He admits regularly smoking marijuana four times a month between 1968 and 1972, using LSD 12 times in 1968 to 1969 and taking his wife's prescription diet pills sometime in the mid-1970s. Ex. 12 at 14-19. The individual contends that he stopped using illegal drugs sometime in the 1970s when he and his wife started a family. *Id.* at 21.

In 1983, the DOE granted the individual a security clearance in conjunction with his employment with a DOE contractor. Ex. 3. One night in February 1992, the individual agreed to meet his college-age son and his son's friends for dinner at a restaurant. Ex. 12 at 12-13. Prior to dinner, one of the son's friends passed a marijuana cigarette in the restaurant parking lot, and the individual took what he claims to be "one puff" of the cigarette. *Id.* at 13. The individual was 49 years old at the time. Ex. 7.

Five years later in 1997, the individual completed a QNSP as part of a routine background reinvestigation. *See* Ex. 8. Question 24 (a) on the QNSP asks: "since the age of 16 or in the last 7 years, whichever is shorter, have you *illegally* used any controlled substance, for example, marijuana . . ." *Id.* The individual responded negatively to the question. *Id.* Question 24 (b) on the 1997 QNSP asks, in pertinent part, "Have you *ever*

used a controlled substance while . . . possessing a security clearance . . .” *Id.* The individual also responded negatively to this question.

During another routine reinvestigation in 2003, the individual completed a QNSP which inquired whether he had illegally used a controlled substance possessing a security clearance. *See* Ex. 7. Again, the individual provided a negative response.

On November 14, 2006, the individual completed a QNSP in connection with his application to be included in the DOE’s HRP. This time the individual responded affirmatively to the question whether he had ever illegally used a controlled substance while possessing a security clearance. Ex. 6. He explained on the QNSP that he had used marijuana one time in February 1992.

## **V. Analysis**

I have thoroughly considered the record of this proceeding, including the submissions tendered in this case and the testimony of the witnesses presented at the hearing. After due deliberation, I have determined that the individual’s access authorization should not be restored. I cannot find that restoring the individual’s security clearance would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings I make in support of this decision are discussed below.

### **Criterion F**

#### **1. The Nature of the Falsifications**

The first issue to be resolved is whether the two falsifications at issue were deliberate or inadvertent. At the hearing, the individual offered three explanations for his inconsistent responses to the illegal drug question on his security forms. First, he testified that he did not equate taking one puff on a marijuana cigarette with using an illegal substance. Tr. at 87. Second, he claimed at the hearing that he had forgotten about his 1992 marijuana usage until he attended family therapy during his son’s inpatient drug treatment. *Id.* at 65, 86-87. Third, he testified that he interpreted the question on the 2006 QNSP as asking whether he had ever possessed an illegal substance and, for this reason, responded affirmatively to the question. *Id.* at 83-84. He then explained that he knew his son had possessed illegal drugs while living in his home and he thought that his son’s illegal drug possession might vicariously be attributed to him. *Id.*

None of the arguments presented by the individual persuade me that he inadvertently failed to disclose his illegal drug use on his 1997 and 2003 security forms. First, his characterization of his marijuana use as “insignificant” and his concomitant rationalization that it need not be reported on the subject security forms does not negate the fact that he deliberated before choosing not to divulge what he thought was “insignificant” illegal drug use to the DOE. Second, even though the individual’s wife corroborated her husband’s testimony that she and her husband attended family therapy in conjunction with their son’s inpatient drug treatment, I am not convinced that this experience triggered the individual’s recollection of his 1992 marijuana usage. The

individual's wife testified that her husband never mentioned his 1992 drug use during the family therapy sessions.<sup>5</sup> Moreover, had the individual's memory been refreshed during those family therapy sessions in 2005,<sup>6</sup> I would have expected him to promptly notify the DOE in 2005 that he had provided, under penalty of perjury, incorrect information on two security forms. Instead, he waited 18 months to correct the record on this matter. Finally, with regard to the individual's third excuse, I find that no reasonable person with the individual's education level and maturity would have misinterpreted the illegal drug question in the manner in which he claims.

## 2. Mitigation

Having found that the individual deliberately provided false information to the DOE on two separate security forms, I now must evaluate whether the individual has provided convincing evidence to mitigate the security concerns associated with his falsifications.

The individual argued at the hearing that the DOE would never have found out about his illegal drug use had he not disclosed it on his 2006 security form and implied that I should credit him with voluntarily disclosing his past falsifications. *Id.* at 119. He also pointed to his purported unblemished 40-year employment history as a positive factor in his favor. Finally, he testified that "it will never happen again." *Id.* at 102.

As an initial matter, I am not convinced that the DOE would not have learned of the individual's 1992 illegal drug use on its own. For example, during a routine background investigation, the individual's son might have been interviewed and queried about his father's past illegal drug use. Second, while the individual disclosed his 1992 illegal drug use on his 2006 QNSP, he did so only after being confronted with the choice of lying again to the DOE or revealing his past falsehoods. In other cases, Hearing Officers have held that the disclosure of a falsification was not at a clearance holder's initiative because it was not made prior to his obligation to complete an updated security form. *See Personnel Security Hearing*, (Case No. VSO-0499) <http://www.oha.doe.gov/cases/security/vso.0499.pdf>; *Personnel Security Hearing*, (Case No. VSO-049), 25 DOE ¶ 82,785 (1996), *aff'd*, *Personnel Security Review*, (Case No. VSA-0049), 25 DOE ¶ 83,011 (1996) (terminated by OSA, 1996).

The individual's uncorroborated testimony that he possesses an unblemished employment record, if true, is a positive factor in his favor. However, this fact alone does not outweigh the other negative factors in this case. Specifically, the individual had held a security clearance for nine years when he certified in writing, not once but twice, under penalty of perjury that he had truthfully completed the two security forms at issue. Moreover, at the time he lied to the DOE, the individual was a highly educated, mature person who certainly was aware of the consequences of his lying and the vulnerable position in which

---

<sup>5</sup> The individual's wife revealed that her husband only told her about his 1992 marijuana use two weeks before the hearing. *Id.* at 65.

<sup>6</sup> The individual could not remember at the hearing whether the family therapy occurred in 2005 or 2006. He submitted a post-hearing submission which showed that his son received inpatient drug treatment from April 21, 2005 to May 19, 2005. Ex. C.

he was placing himself. During the 14-year period that he concealed his illegal drug use from the DOE<sup>7</sup>, the individual was susceptible to blackmail, coercion and duress.

With regard to the individual's testimony that he will not lie again to the DOE, I do not find that this assurance is sufficient to mitigate the Criterion F concern at issue. In other cases involving verified falsifications, Hearing Officers have stated that a subsequent pattern of responsible behavior is of vital importance to mitigating security concerns arising from irresponsible behavior such as lying. See *Personnel Security Hearing*, (Case No. TSO-0394) <http://www.oha.doe.gov/cases/security/tso0394.pdf>, (six months of honest behavior not sufficient to mitigate dishonesty that spanned for nine months); *Personnel Security Hearing*, (Case No. TSO-0302); <http://www.oha.doe.gov/cases/security/tso0302.pdf>, (10 months of honest behavior not sufficient to mitigate falsehood that spanned 16 years); *Personnel Security Hearing* (Case No. VSO-0448), 28 DOE ¶ 82,816(2001) (affirmed by OSA 2001) (11-month period not sufficient to mitigate four year period of deception), *Personnel Security Hearing* (Case No. VSO-0440), 28 DOE ¶ 82,816 (2001) (affirmed by OSA 2001) (18 months of responsible, honest behavior sufficient evidence of reformation from dishonesty that spanned six months in duration), *Personnel Security Hearing*, (Case No. VSO-0289) 27 DOE ¶ 82,823 (1999), *aff'd Personnel Security Review*, 27 DOE ¶ 83,025 (2000) (affirmed by OSA 2000) (19-month period not sufficient to mitigate lying on security form after a 12-year period of concealment). In this case, the individual's pattern of responsible conduct is measured beginning in November 2006 when he first admitted the truth to the DOE about his lying on the 1997 and 2003 security forms. I simply cannot find that the individual is rehabilitated from his nine years of deception by a period of one year of responsible, honest conduct. More time needs to elapse before I could make a predictive assessment that the individual has mitigated the security concerns associated with his past lying.

## **Criterion K**

The individual testified that he has not used illegal drugs since 1992 and never intends to use them again. Tr. at 89. He explained that he has seen what drugs can do to a person and now realizes that he could have become a drug addict 40 years ago when he first began experimenting with illegal drugs. *Id.*

The individual's wife provided poignant testimony about the couple's son who is a cocaine addict and how their son's addiction has impacted their lives. *Id.* 75. She is certain that when the individual used marijuana recreationally with their son in 1992, the individual never foresaw that their son's drug use would evolve into a drug addiction. *Id.* at 70. The wife testified that their son has been arrested three times in the last six months and that after their son's last arrest, the individual decided to invoke "tough love" and not see their son again. *Id.* at 73.

---

<sup>7</sup> The individual also concealed his 1992 illegal drug use from his wife and best friend, both of whom confirmed this fact at the hearing. Tr. at 45, 61.

One of the individual's close friends of 25 years testified that he sees the individual most weekends and has never observed him using illegal drugs. *Id.* at 34, 43. He opined that "doing illegal things is not [the individual's] cup of tea." *Id.* at 46.

As an initial matter, I find that the individual's drug use that occurred 35 to 40 years ago is so remote in time that its seriousness has been mitigated by the passage of time. Regarding the individual's marijuana use in 1992, that usage is also not recent, having occurred 15 years ago. The circumstances under which the individual used marijuana, however, are troubling. The individual was 49 years old and was a DOE security clearance holder when he decided to share a marijuana cigarette with his college-age son and his son's friends so he could "be part of their lives," and "one of the guys." *Id.* at 89. The individual's lapse in judgment on this occasion certainly cannot be ascribed to his immaturity at the time. Furthermore, his lapse in judgment is serious given that he had held a DOE security clearance for nine years at the time and was well aware of the illegality of his actions.

Nevertheless, the individual convinced me through his own testimony and that of his wife that there is little likelihood that he will use illegal drugs again. Both the individual and his wife have experienced pain and anguish as they struggle to cope with their son's cocaine addiction. Moreover, they have witnessed in a very personal way how recreational drug use can spiral out of control into a serious drug addiction. Finally, the individual also testified convincingly that he does not associate with any of his son's friends who are involved in illegal drugs. *Id.* at 93.

After carefully weighing all the evidence, both favorable and unfavorable, I find that the individual has presented compelling evidence which mitigates the Criterion K security concerns at issue.

### **Criterion L**

To mitigate the Criterion L concerns, the individual presented the testimony of his supervisor and his friend, both of whom testified that they trust him. *Id.* at 38, 54. In addition, the individual admitted at the hearing that he understood in 1992 that taking one puff of a marijuana cigarette was illegal under both federal and state law and a violation of DOE policy. *Id.* at 111. Under questioning at the hearing, he also admitted that he understood the DOE's security concern that he would pick and choose which laws to comply with and therefore posed a risk to national security. *Id.* at 106. He added, however, that he takes his security clearance very seriously. *Id.* at 107. In evaluating the evidence on this matter, I considered that the individual's violation of criminal law and DOE policy occurred 15 years ago and on only one occasion. Against these two positive factors are the following negative ones. First, the use of illegal drugs while holding a DOE security clearance is a very serious matter. Second, the individual had held a DOE security clearance for nine years in 1992 when he elected to smoke marijuana. Third, the individual was a mature person of 49 years when he used illegal drugs. Fourth, the individual's motivation for using marijuana was to be part of his college-age son's life. Finally, I was not convinced from the individual's testimony or demeanor that he would scrupulously follow all DOE rules in the future, including those that he deemed to be "insignificant." What I found lacking in the individual's testimony was any element of



remorse for his past action, or any demonstrable conviction to comport his behavior beyond reproach. In the end, I must err on the side of national security with regard to this issue before me and find that the individual did not present compelling evidence to mitigate Criterion L.

## **V. Conclusion**

In the above analysis, I have found that there was sufficient derogatory information in the possession of the DOE that raises serious security concerns under Criteria F, K and L. After considering all the relevant information, favorable and unfavorable, in a comprehensive common-sense manner, including weighing the testimony and other evidence presented at the hearing, I have found that the individual has brought forth compelling evidence to mitigate the Criterion K concerns only. He did not, however, bring forth sufficient compelling evidence to mitigate the security concerns advanced by the LSO under Criterion F and L. I therefore cannot find that restoring the individual's access authorization would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, I have determined that the individual's access authorization should not be restored. The parties may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28

Ann S. Augustyn  
Hearing Officer  
Office of Hearings and Appeals

Date: November 28, 2007